Filed 3/9/10 In re Protopappas CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re TONY PROTOPAPPAS	G042075
on Habeas Corpus.	(Super. Ct. No. C-52021)
	O P I N I O N

Original proceedings; petition for a writ of habeas corpus. Petition granted. Writ issued.

Tony Protopappas, in pro. per.; and Richard Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, and Heather Bushman and Amy M. Roebuck, Deputy Attorneys General, for Respondent.

* * *

In October 1984, a jury convicted petitioner Tony Protopappas of three counts of second degree murder for the anesthesia-related deaths of three of his dental patients. The court sentenced him to three concurrent terms of 15 years to life. Over 23 years later, on May 29, 2008, at petitioner's fourth subsequent parole consideration hearing, the Board of Parole Hearings (the Board) denied him parole for a period of two years, finding, inter alia, he lacked sufficient insight into his crime. Petitioner petitioned for a writ of habeas corpus, which petition was denied by the Orange County Superior Court.[1]

Petitioner now petitions this court for a writ of habeas corpus, arguing he does not present a current threat to public safety. For the reasons discussed below, we grant the petition.

FACTS

The Commitment Offenses

In a 1988 published opinion affirming petitioner's second degree murder convictions (the 1988 opinion), this court found substantial evidence that petitioner acted with implied malice; his misconduct constituted "more than gross negligence." (*People v. Protopappas* (1988) 201 Cal.App.3d 152, 172 (*Protopappas*).) At the 2008 parole hearing, petitioner stipulated to the factual recitation in the 1988 opinion. We recite the facts (taken from the 1988 opinion) in some detail because the relevant inquiry before us "is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*).)

[1] Petitioner initially petitioned the Sacramento County Superior Court, which transferred his petition to the Orange County Superior Court.

Petitioner opened his dental clinic in 1974, and by 1982, employed five dentists. (*Protopappas*, *supra*, 201 Cal.App.3d at p. 155.) He was, however, the lone person at the clinic licensed to administer general anesthesia. (*Ibid.*)

The first victim, Kim Andreassen, was a frail 24-year-old who told petitioner "she suffered from lupus . . . , total kidney failure . . . , high blood pressure, anemia, a heart murmur, and chronic seizure disorder." (*Protopappas*, *supra*, 201 Cal.App.3d at p. 156.) Petitioner examined her, said she needed a root canal and other procedures, and "recommended local anesthesia to perform the work." (*Ibid*.) Andreassen refused "to have any work done unless she was asleep. [Petitioner] warned her that, because of her poor health, there was a very high risk she could die under general anesthesia." (*Ibid*.) Petitioner's "office manager, who had contacted Andreassen's general physician, informed [petitioner] she was not to be placed under general anesthesia even for a short time." (*Ibid*.) On the scheduled treatment day, petitioner administered "his standard doses of drugs" intravenously to Andreassen and also "gave her a local anesthetic." (*Ibid*.) With Andreassen asleep, petitioner "began the scheduled treatment. Within five to twenty minutes, Andreassen's lips turned purple, her face pale blue, and her pulse became irregular. [Petitioner] administered oxygen and her lip color returned to normal. At one point, upon getting restless and opening her eyes, she was given brevital." (*Id.* at pp. 156-157.) "A contested factual issue at trial was whether Andreassen was put under general anesthesia" with Brevital. Petitioner "testified she was not; she was given an I.V. or conscious sedation instead." (*Id*. at p. 157, fn. 3.) "When an assistant noticed Andreassen was taking very shallow breaths followed by big deep breaths, he directed [petitioner's] attention to the irregular breathing. [Petitioner] responded, 'Maybe that's normal for her because she is so ill.' He completed the dental work. Andreassen was breathing normally when he left the room . . . . [¶] Ten to fifteen minutes later her breathing became shallow and irregular, her pulse became weak, and her face turned blue. The attending assistant gave her

oxygen, and . . . called another dentist, Dr. Brown, to help. He observed that Andreassen had gone into respiratory collapse and immediately placed an oxygen mask on her face. Two to three minutes later, [petitioner] arrived and gave her oxygen. When she failed to respond, he left the room to get additional medication. Either [petitioner] or his assistant brought in narcan, a medication to reverse the effects of the drugs she had received. [Petitioner] administered the narcan. . . . [P]aramedics were called shortly thereafter." (*Id*. at pp. 157, fn. omitted.) "Despite the efforts of the paramedics, Andreassen was clinically dead when she arrived at the hospital." (*Id.* at p. 157.)

"The coroner concluded the general anesthesia resulted in critical cardiac arrest with the disseminated lupus being a significant contributing factor. Two anesthesiologists and two oral surgeons testifying as expert witnesses opined that she died of a massive drug overdose." (*Protopappas, supra,* 201 Cal.App.3d at p. 157.) An anesthesiologist "testified that Andreassen's irregular breathing was symptomatic of severe toxicity and should have been interpreted as urgent and life threatening" and that petitioner's "delay in calling the paramedics endangered her life . . . ." (*Ibid*.)

Petitioner "testified in his own defense. He felt the deep cavity in Andreassen's tooth needed a root canal or the lupus would cause infection to spread and would become life threatening. He did not put her under general anesthesia but used conscious sedation instead." (*Protopappas, supra,* 201 Cal.App.3d at p. 158.)

Four and a half months later, the second victim, 13-year-old Patricia Craven, had swollen tonsils, but was otherwise "active and healthy when she went to [petitioner] to have four wisdom teeth pulled, eight teeth filled, and a tooth crowned." (*Protopappas, supra*, 201 Cal.App.3d at p. 158.) Petitioner "administered his standard setup of intravenous medications" and "assured Craven's mother the enlarged tonsils would not be a problem but that her daughter would be watched more closely. A few minutes after the first injection, Craven appeared to hold her breath and became pale. [Petitioner] gave her oxygen and 10 minutes later left the room." (*Ibid*.) "As soon as she

was sure Craven's mother had left the operating room, a second dentist, Dr. Marietta Badea, entered to do the fillings and prepare for the crown. [Petitioner] instructed her to give prearranged doses of various drugs to Craven whenever she showed signs of coming out of anesthesia (becoming light). He also cautioned her about the swollen tonsils. Dr. Badea was not licensed to administer anesthesia medications." (*Ibid*.) "Within the next two and one-half to three hours, Craven became light nearly a dozen times." (*Id*. at p. 159.) "Each time Craven became light, Dr. Badea gave her additional intravenous drugs without supplemental oxygen. She was scared about the quantity the adolescent had received but [petitioner], never again leaving his own patient to check on Craven's condition, ordered her to administer more drugs to keep Craven down." (*Ibid*.) When Dr. Badea finished her work, she was "alarmed at the amount of drugs already given to Craven, [and asked petitioner] to hurry." (*Ibid*.) "He directed her to keep the girl down until he was able to perform the extractions. When Craven awoke again, Dr. Badea gave her more drugs as ordered." (*Ibid*.) Petitioner "did not return to Craven's operating room for another half an hour. He gave her additional anesthetic," extracted four teeth in 45 minutes, and left, returning "10 minutes later to suction her throat. She was so deeply sedated she failed to gag when suctioned. Although he acknowledged the swollen tonsils would probably impair Craven's breathing, he left the room shortly thereafter." (*Ibid*.) "The office manager and [petitioner] tried, unsuccessfully, to awaken Craven to go home." (*Ibid*.) Petitioner "told her mother she was 'very deep under' and it would be at least one hour before she would awaken." (*Ibid*.) "Dr. James Rolfe, another staff dentist at the clinic, helped discharge Craven once he was told she was ready." (*Ibid*.) "Having never assisted with a patient so unresponsive, he asked the office manager if [petitioner] was available to check her. She told him he was not available and the patient would be fine." (*Ibid*.) Rolfe "carried [Craven] to the car, placed her with her mouth down to allow the fluid to drain, and told her mother to watch her breathing." (*Ibid*.) "Craven never regained consciousness" and "died 11 days later." (*Id*. at p. 160.)

The coroner found she died of cardiac arrest caused by the medication received, with the immediate cause of death being pneumonia in the right lung. The prosecution's experts opined "Craven suffered a massive drug overdose and died as a result of Protopappas's failure to closely supervise her and to recognize her obstructed airway." (*Ibid*.) Petitioner testified he "instructed his staff to keep her there to sleep off the anesthesia, but when he returned to check on her, she had been released." (*Ibid*.)

Three days after Craven's treatment and release (while Craven still lay in a coma), 31-year-old Cathryn Jones came to petitioner's clinic, having "had a pituitary tumor removed nine months earlier and . . . suffering from periodontitis, bone loss, and abscess formation around a great number of her teeth. On [petitioner's] advice, she decided to have her teeth removed." (*Protopappas, supra,* 201 Cal.App.3d at p. 160.) One of petitioner's assistants contacted Jones's physician, who "approved the use of sodium pentothal only." (*Id*. at pp. 160-161.) Petitioner placed Jones "under general anesthesia using his standard setup" and "began removing her teeth." (*Id*. at p. 161.) "About one and one-half hours into the operation, the dental assistant told [petitioner] Jones's lips were turning purple. [Petitioner] testified he looked at her lips but they were not blue. He did not take her pulse because bright red blood was squirting in her mouth indicating to him that she was properly oxygenated. A short while later the assistant again told [petitioner] Jones's lips were turning purple. He became angry and told the assistant she did not know what purple was. Comparing Jones's lips to a purple syringe cap he held up, [petitioner] said, 'Goddamn it, this is purple,' and pointing to her lips, 'this is not.' The assistant warned him of Jones's deteriorating condition a third time, this time pointing out that her fingernails were blue. [Petitioner] insisted they were pink." (*Ibid*.) When "Jones did not appear to be breathing," petitioner acknowledged she needed oxygen and gave "her three short breaths through an oxygen mask. She did not respond. The assistant could not hear a heartbeat but [petitioner] said he detected a faint one. He began CPR and sent his assistant to get some narcan. He then stopped to give

her a local anesthetic under the tongue to stimulate her heart." (*Ibid*.) "Seven to ten minutes after the emergency arose, an assistant asked [petitioner] for the third time if the paramedics should be called and he finally responded affirmatively." (*Ibid*.) Jones "died two days later." (*Ibid*.) "The prosecution's experts testified the massive amounts of drugs given to her were lethal." (*Ibid*.)

The 2008 Parole Hearing

At the 2008 parole hearing, petitioner's counsel objected that petitioner's most recent psychological evaluation, dated in 2005, was not currently accurate. The Board overruled the objection, stating its policy was "to go forward with psychological evaluations that are three or fewer years old" and that a senior psychologist had "re-reviewed" the evaluation and "assessed it as being valid to be used at this hearing."

At the time of the hearing, petitioner was nearly 62 years old. His developmental, family, and psychosexual history was normal and he had no mental disorders. He had good relations with his relatives, and had apologized in writing to the victims' families. He had no criminal history of arrests or convictions other than the commitment offenses. The 2005 psychological evaluation found his potential for violence, in "comparison to other minimum security inmates," to be below average.

Petitioner had complied with all the recommendations made by the Board at his previous parole hearing in 2006, i.e., that he get self help, stay disciplinary free, and earn positive chronos. He had been "disciplinary free" for over 20 years. Early in his prison term, he had suffered two violations — one for possession of suspected marijuana seeds and the other for running a gambling operation — with the last one occurring in 1986 or 1987.

Petitioner had "consistently received excellent work reports" from his supervisors at the Folsom Dental Department, where he worked as a denture laboratory

technician. His supervisors "found him to have an exemplary work ethic and honest character" and stated they "would gladly hire him" if he were released on parole.

Petitioner was "an active participant" in Alcoholics Anonymous and Narcotics Anonymous, and involved in many other "self help programs," including victim awareness and stress management programs. He had taken all the programs offered at the prison and was contemplating "re-signing up for some of" them. Petitioner stated that if he were released on parole, he would continue to participate in AA or NA.

The Board asked petitioner about his drug and alcohol abuse while practicing dentistry. Petitioner stated he had used cocaine only in the evenings after work, but did use opiate pain pills during the day to relieve his back pain. In prison, he had stopped his substance use on his own, but AA and NA had helped him understand the "recovery process better." He now understood that his daily substance abuse in the past had affected his "thinking" and "judgment."

If paroled, petitioner planned to live with his brother Cosmos, a dentist, and to work for Cosmos, performing the same type of "dental lab work" he was currently doing at the prison. He would have *no* interaction with patients.

If granted release, petitioner intended to "follow through with whatever [parole or outpatient treatment] conditions are given him." He had a detailed, written plan for Relapse Prevention and Continued Recovery in order "to stay clean and sober," which included attending church, support groups, AA and NA.

Numerous friends and relatives of petitioner had written letters of support for him; some letters were lengthy, thoughtful and informative, and offered petitioner lodging and/or employment. Because of the sheer number of letters, the Board declined to read them into the record. Petitioner's counsel stated for the record "that there is really a great outpouring of support not only with emotional, financial, residential, job employment, and these . . . support letters are from . . . long term stable relationships, friends, family, supporters, old colleagues, people that have known the inmate for the

majority of his life and are behind him a hundred percent in his recovery and a successful reintegration into society."

The Board then focused on a section of the 2005 psychological evaluation reporting that petitioner accepted "causal responsibility" for the crimes, but that he felt he had committed only involuntary manslaughter, not second degree murder. The Board asked petitioner if the statement were still accurate. Petitioner replied, "No, it's totally inaccurate." He explained that the psychologist had asked him "about the trial"; therefore he had described to the psychologist his "state of mind at the time of the trial."[2]

Petitioner told the Board: "I've always accepted full responsibility and I accept full responsibility for the crime. . . . We were speaking as to the legal aspect at the time of trial. . . . I've always accepted responsibility for the deaths of these people . . . . I thought I was correct in anesthetizing these patients then. . . . I do not think so now. . . . [N]ow I was just plain wrong in the way that I did it." "I was wrong and I'm sorry." Petitioner's position today is that he "murdered three people."

When asked why he committed the crimes against "three very vulnerable people," petitioner stated he had been "very arrogant," thinking he was better than he really was. He had been scared to admit that he was incompetent, made serious mistakes, and did not know what he was doing. He was especially scared to let people in the professional field know. He realized his "abilities anesthetizing these people was not what it should have been and [he] made a mistake by not preparing [himself] properly for that and [he] should have been more cautious and [obtained] more training before [undertaking] that particular type of treatment." He had "made mistakes by taking on" the cases of the three victims, which were "very difficult," without proper training in

---

[2] Petitioner's counsel argued the 2005 psychological evaluation was "skewed in that the majority of the time[] spent in the clinical evaluation part was spent discussing a court trial. . . . It was about how he felt at the time he was involved in a court trial and [was vigorously asserting] his innocence . . . ."

handling the emergencies that arose. He took "full responsibility for [the victims'] deaths because if they hadn't come to [his] office obviously then they wouldn't be dead right now." He always had heartfelt sympathy for the families. He apologized to the Andreassen family "right away but then, the legal aspect took over and the lawyers got involved and so . . . apologies to all the families couldn't be done at the time . . . ."

In response to the Board's questions, petitioner described his former dental practice. At the time of the murders, he was "grossing" around $1,200,000. He "was dedicated to [his] practice," "loved the work," and derived great satisfaction out of restoring the teeth of people who came in "just decimated." He had "tended to take on difficult cases in dentistry." He saw patients who "were totally disabled dentally," e.g., children "with totally destroyed dentitions" for whom he rebuilt their mouths from nothing; children with teeth "leveled" but whose "roots were still good so" he "reutilized the anchorage [to rebuild] their whole dentition" with caps; and people who could not use dentures and for whom he did implants to restore "their chewing capabilities."[3] It was an "extreme type of dentistry which is the norm now." Petitioner now understood that part of the reason he took on these difficult cases was because of his ego at the time.

Petitioner affirmed he would never again practice dentistry and had "no qualms about never doing that again." He was "perfectly satisfied" with his life and loved dental lab work. He no longer needed the ego boost that he experienced "back then." He was "perfectly satisfied to live a normal, easy going life."

The Board asked petitioner why he failed to pay attention and to react when warned that patients were "headed toward a crash." Petitioner replied he "was frightened

---

[3] In a letter of support, petitioner's trial counsel stated petitioner, as a dentist, had taken "pride in his work, especially in the areas of reconstruction and implantation of fixed prosthesis for persons unable to wear conventional dentures, due to trauma or progressive deterioration of the bone structures of the mouth and jaw" and "in very difficult cases where patients had been turned away by other dentists who 'wrote them off' as high risk patients, without significant chance of success."

to call the paramedics right away even though [he] did call them later on," partly because he did not want his colleagues to know he was incompetent and was killing his patients. His hesitation resulted from his ego and fright. The Board asked petitioner why he had had such a "massive" ego. Petitioner replied he did not think he could fail, based on his previous experience with patients in administering anesthesia, and believed he "could pull these people out . . . ."

The Board asked petitioner whether he had made any changes in his dental practice after the first victim's death. Petitioner replied he was not notified that the first victim "died as a result of anesthesia"; the autopsy report stated she died of cardiac arrest. Although the first victim had been transported to the hospital by paramedics, the incident had not raised a red flag with him because the "patient had pre-existing systemic disease [lupus] which could have contributed."

But, petitioner had been "very alarmed over" the deaths of the second and third patients.

The Board asked petitioner "why it didn't surprise" him that patients had died as a result of his dental treatment. Petitioner stated: "[I]t did surprise me. . . . I didn't handle the situations properly. . . . I wasn't thinking clearly at the time. Things were very confusing. And because of the interplay of their systemic conditions, it caused me . . . to wonder. . . . I thought about that and dentists don't lose patients and . . . I criticized myself quite a bit because I didn't react properly and that means calling the paramedics immediately which could have saved, I believe, a couple of these people's lives . . . . I hesitated and had I done things promptly, a couple of these people may not have died but I waited too long and . . . those were the elements that created my crime." Had he changed his procedures, "they would not have died."

The Board then invited counsel to make closing statements.

The deputy district attorney expressed the People's view that petitioner was unsuitable for parole. He argued "the hallmark of the inmate's history is one of

minimizing and blame-shifting for what occurred in these three murders." He characterized as "alarming" certain statements in petitioner's version of the crime in the 2008 Board Report (a document entitled "Life Prisoner Evaluation" described in more detail below), and contended petitioner "was greedy" and "hubristic" and had not demonstrated he had gained insight into the murders.

Petitioner's counsel argued, inter alia, petitioner had lost his dentistry license and would never again be licensed to practice dentistry. He had good skills in making dentures and also as a paralegal and in office services technology. Petitioner had "a good solid parole plan which is demonstrated by the volume of support letters that are in the file . . . ." Counsel "encourage[d] the Panel to look closely at" these letters, which showed a "tremendous outpouring of support, financial, spiritual, guidance, familial support, job offers." Counsel cited this court's statement in the 2008 opinion that petitioner "did not truly intend to kill anyone." (*Protopappas*, *supra*, 201 Cal.App.3d at p. 167, fn. 9 ["The most troubling aspect of this case is that Protopappas has been convicted of murder for acts committed as a practicing, licensed dentist under circumstances where there can be no doubt he did not truly intend to kill anyone"].) She noted petitioner had employed the same procedures with the three victims "that he had used for nine years prior to these events."

Petitioner stated he took full responsibility for the victims' deaths and was "very, very sorry," and that he had "done everything that [he] could possibly do to make [himself] parole eligible."

The Board's Decision

The Board denied petitioner parole for two years, finding he "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison," on four grounds: (1) the "offense was carried out in an especially heinous, cruel

and callous manner," (2) the district attorney opposed his release, (3) petitioner had a history of substance abuse, and (4) petitioner lacked insight into the crime.

The Board stated: "[Y]ou said the words that, as an intelligent man, you would wish to say if you [wanted] to be found suitable for parole. That is, that you take responsibility and that you were arrogant. . . . However, you also represented that you did what you did out of fear. At the same time, when asked if you wish to endorse a particular version of the crime, you said readily and in consultation with your attorney, that in fact, the prisoner's version that is represented in the January 2008 . . . Board Report would be the version that you would basically endorse. So, as a result, I'm going to read into the record this version."

The Board then recited from the 2008 Board Report the following "Prisoner's Version," which is an "excerpt" from a statement petitioner made nine years earlier in January 1999:

"The deaths were tragic. I did not provide dentistry service with the intent of harming or killing anybody. There was nothing to gain by these accidents. I demonstrated poor judgment and acted [too] hastily in allowing my medical assistants to obtain past medical history and determine the safety of the agnostics used. I admit the assistants were not properly trained to understand the possible complications and consequences of the types of general anesthetics used. The amount of drugs used on each patient depends upon the amount of work, medical history and time needed with each patient.

"I knew Kim [Andreassen] had a kidney problem and knew that Brevitol would put her to sleep. I didn't want to put her to sleep. I didn't use Brevitol on her. I made an error in not consulting her physician personally, and inquiring about the correct general anesthetic that would be appropriate.

"I extracted four (4) wisdom teeth and performed other dental work on Patricia Craven. She was placed under general anesthetic. After completing the

necessary work, I aroused her by slapping her thigh and pinching her earlobe; she responded positively. I instructed my assistant to keep her there and not release her until I gave permission to do so. I thought the staff understood I was the only person authorized to release a patient. Somehow she was released without authorization. Had she remained at my office she would not have died.

"Cathryn Jones had undergone Pituitary surgery to remove a tumor approximately one (1) year prior to her dental work. I instructed her to obtain permission from her personal physician so I could remove all her teeth. On the day the dental work was performed, contact was made with her physician. I allowed my staff to consult with the physician regarding the general anesthetic. I believe[d] that because permission had been given by her physician, I could safely use drugs I commonly administered.

"I admit I used poor judgment and made a bad decision in the procedures on Andreassen and Jones. I was the individual responsible for their safety and care. I allowed myself to receive incomplete information related to their medical history and the anesthetics I could safely use. I didn't follow through, as I should have. The whole incident has hurt a lot of people, including myself. If I could change what happened, I would. The death of a loved one is a terrible loss, their lives have been changed permanently, and my life has been changed permanently. All that I've worked for and worked toward is shattered."

Having recited this excerpt, the Board explained it "perceive[d] a conflict between" petitioner's version of the crime and his "statements of taking responsibility," noting his version assigned blame to other people and their lack of training. The Board continued: "It appears, sir, to this Panel that you still lack insight. You had medical emergencies going on with these patients. You basically didn't listen to the signals and it was a lack of caring on [your] part, apparently. You didn't care. You . . . demonstrated that in your daily life . . . . When you weren't at the office[,] you used narcotics. You . . . didn't care about people in general. This . . . reaches far outside your practice,

sir, and it's subtends your entire practice not just these three patients. It's really lucky that more people didn't die than these three patients . . . . These were people [who were having] medical emergencies that . . . you should have dealt with and didn't. And, the representation that you were doing this out of fear is very scary if it's true because it means that your ego was so huge and so large that it just totally encompassed you[;] it's shown by what, in fact, you did do in your personal life as far as your abuse of drugs. So, basically, sir, this Panel wants to see you serve more time because it's important that you look at what we've raised today, that you read the transcript that you helped create and go over what you've represented . . . as your view of this crime. We recognize that you will never, by law, be in a position to break the law in the same way that you did before but that doesn't necessarily make you safe because arrogant people who . . . care nothing for others are not safe people to be around . . . ."

The Board "note[d] that about a third of the letters [of support] were old letters" dated in 2005; therefore the Board did not consider these.[4] Furthermore, the Board planned to order a new psychological evaluation for petitioner's next hearing.

Habeas Corpus Petition to Superior Court

The Superior Court ruled the Board did not abuse its discretion by denying petitioner parole because he lacked "sufficient insight into his criminal behavior," as shown by the inconsistency between (1) his statements at the hearing accepting responsibility for the crimes and (2) his "adopted version of his crimes" reflecting he failed to properly train his staff and improperly allowed them "to obtain past medical histories . . . ." His "conflicting statements about the offenses" showed he failed "to accept unequivocal responsibility for his actions . . . ."

---

[4] Our review of these letters reveals that each 2005 letter was attached to (and incorporated by reference into) a new letter written by the respective supporter. The Board should have read and considered the incorporated 2005 letters.

DISCUSSION

Petitioner argues the Board violated his right to due process by denying him parole because no evidence shows he poses an unreasonable risk of danger to society. He asserts "it is extremely unlikely anything like these crimes would ever occur again if [he] is placed on supervised parole," because his dental "license has been revoked and will never be reinstated" and he "will never be able to administer anesthesia to a patient again."

The Attorney General counters the Board observed petitioner's demeanor and "presentation at the hearing" and found he lacked adequate insight into the commitment offense. The Attorney General asserts petitioner "officially endorsed a version of the crimes that still distanced himself from personal responsibility; specifically [he] still takes great pains to remove some of the blame from himself and clarify that the murders resulted in part from poor training and mistakes of staff." But the Attorney General does not explain how petitioner's alleged lack of insight renders him a current threat to public safety.

Penal Code section 3041[5] and title 15, section 2281 of the California Code of Regulations govern the Board's parole decisions. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202 (*Lawrence*).) "Subdivision (b) of section 3041 provides that a release date must be set 'unless [the Board] determines that the gravity of the current convicted . . . offenses . . . is such that consideration of the *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.'" (*Id.* at p. 1202.) "Title 15, Section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board in carrying out the mandate of the statute. The regulation is designed to guide the Board's

[5] All statutory references are to the Penal Code.

assessment of whether the inmate poses 'an unreasonable risk of danger to society if released from prison,' and thus whether he or she is suitable for parole." (*Ibid.*)

"[B]ecause the paramount consideration . . . under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a *current threat to public safety*, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis, supra,* 44 Cal.4th at p. 1254, italics added.) "This standard is unquestionably deferential, but certainly is not toothless"; a reviewing court must ascertain whether the Board's denial is based on "reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of *current dangerousness*." (*Lawrence, supra*, 44 Cal.4th at p. 1210, italics added.)

In assessing whether a petitioner poses a current threat to public safety, a court may ask whether his or her unsuitability factors "are *probative* to the central issue of *current* dangerousness" (*Lawrence*, *supra*, 44 Cal.4th at p. 1221) or whether "the circumstances of the commitment offense, when considered in light of other facts in the record, . . . continue to be *predictive* of current dangerousness . . . ." (*Shaputis, supra*, 44 Cal.4th at pp. 1254-1255, italics added.) Stated another way, are "the circumstances that led to the murder . . . likely to recur"? (*In re Rozzo* (2009) 172 Cal.App.4th 40, 60.) Is the petitioner unpredictable? (*In re P.F. Lazor* (2009) 172 Cal.App.4th 1185, 1195.) The inquiry must always be "an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Shaputis,* at p. 1255.)

Here, no evidence supports the Board's finding petitioner is currently dangerous. The Board recognized petitioner would "never, by law, be in a position to

break the law in the same way [he] did before." Nonetheless, the Board found him to be a generalized danger to society because he is arrogant, greedy, and "care[s] nothing for others." We discern no rational nexus between the Board's finding petitioner is arrogant, greedy, and uncaring, and its conclusion he is a threat to public safety. A petitioner's current dangerousness must be measured relative to that of the "'average unconfined citizen.'" (See *Shaputis*, *supra*, 44 Cal.4th at p. 1252; see also *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1490 [inmate "'does not pose any more potential for violence than the average citizen in the community'"].) Like some other members of the general unconfined populace, petitioner may perhaps be proud, materialistic, and self-centered. But personality traits of arrogance, greed, and narcissism, without more, do not support incarceration. Here, the Board did not base its current dangerousness assessment on any mental disorder suffered by petitioner. Indeed, in petitioner's most recent psychological evaluation, a senior psychologist diagnosed no mental disorders and stated petitioner's "prognosis for stabilized mental health functioning is good."

The other unsuitability factors upon which the Board relied — i.e., the heinous nature of petitioner's crimes and the Board's perception he lacks insight into those offenses — are not predictive of a current danger posed to society by petitioner.[6] The circumstances that led to the murders are highly unlikely to recur because petitioner's dentistry license has been revoked. Petitioner has not abused drugs and alcohol for over two decades. (See *In re Smith* (2003) 114 Cal.App.4th 343, 372 [immutable factor of past use of drugs should not establish unsuitability, without regard to evidence indicating no current desire for drugs and little current likelihood of drug relapse].) He is not unpredictable. He has no mental disorders nor any history of

---

[6] Absent a rational nexus between supposed "lack of insight" and current dangerousness, "lack of insight" is simply a catch-phrase, not a legitimate unsuitability factor for parole. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1210 [Board's reasoning must establish a rational nexus between unsuitability factors and determination of current dangerousness].)

violence and it is undisputed he never intended to kill his victims. His relationships with his family and his friends are good, and his file is replete with letters of support. (Compare with *Shaputis*, *supra*, 44 Cal.4th at pp. 1251, 1252 [inmate had "'schizoid quality to interpersonal relationships'" and "strained" relationships with daughters who alleged molestation and domestic violence against him, and "planned to reside with his new wife" despite his history of domestic violence that led to his murder of second wife].)

Under these circumstances, the record contains no "evidence supporting a finding [petitioner] continues to pose a threat to public safety — petitioner's due process and statutory rights were violated by the" Board's denial of parole.[7] (*Lawrence*, *supra*, 44 Cal.4th at p. 1227.)

The parties disagree on the appropriate remedy. Petitioner requests that we remand the matter to the Board with instructions to grant parole. The Attorney General argues the Board should be allowed another opportunity to conduct a de novo parole hearing. Under the circumstances of this case, a middle course is the correct one: "[W]e direct the [Board] to find [petitioner] suitable for parole unless new information, either

---

[7] We do not consider petitioner's alternate contention the Board violated California Code of Regulations, title 15, section 2236 by penalizing him for refusing to discuss the crime. That regulation provides in pertinent part: "The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner." Petitioner, who had stipulated to the factual recitation in the 1988 opinion, chose not "to discuss the commitment offense." Nonetheless, the Board asked petitioner if he wished to endorse any past statement he had made of his "version of the crime . . . ." Petitioner's *counsel* stated the Board could incorporate by reference or read into the record petitioner's version in the 2008 Board Report. It is not clear that petitioner intended to adopt this version, in contrast to his obvious desire to accept the factual summary in the 1988 opinion. Petitioner also contends the Board improperly required him to admit guilt to second degree murder and that the Board wrongly retried the case, in violation of section 5011.

previously undiscovered or discovered subsequent to the 200[8] hearing, supports a determination that [petitioner] poses an unreasonable risk of danger if released on parole." (*In re Rico* (2009) 171 Cal.App.4th 659, 688.)

DISPOSITION

Petitioner's petition for writ of habeas corpus is granted and the Board is ordered to vacate its decision finding him unsuitable for parole. The Board is directed to conduct a new parole suitability hearing within 30 days of the issuance of the remittitur in this matter. At that hearing, the Board is directed to find petitioner suitable for parole unless either previously undiscovered evidence or new evidence subsequent to the 2008 parole hearing, regarding his conduct, circumstances, or change in his mental state, supports a determination that he currently poses an unreasonable risk of danger to society if released on parole. Pursuant to California Rules of Court, rule 8.387(b)(3)(A), this opinion shall be final as to this court within five days after it is filed.[8]

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

[8] Petitioner's request that we take judicial notice of several published opinions (including the 1988 opinion) is denied as unnecessary. We have nevertheless considered the opinions he cited in the course of conducting our review.